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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 571

WERNER C. VON CLEMM, ET AL.,
Petitioners,
v.
ELIZABETH RUDEL SMITH, Treasurer of The United States, et al.,
Respondents,
v.
INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, ET AL.,
Intervenor-Respondents.

MOTION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WERNER C. VON CLEMM, *pro se*
214 East 17th Street
New York, N. Y. 10003

New York, N. Y.
December 27, 1966.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Werner C. Von Clemm, hereby respectfully requests this Honorable Court to rehear the Petition for Writ of Certiorari previously filed, which this Court denied on December 5, 1966, Justices Black, Douglas and Stewart being of the opinion that certiorari should be granted.

Statement

The petition for a writ of certiorari herein stems from a suit by petitioner commenced 20 years ago, first under Section 32 and then continued under Section 9(a) of the Trading with the Enemy Act, as amended, 50 U.S.C. App. (the Act), to recover the proceeds of certain property vested in the Alien Property Custodian, consisting principally of synthetic and semi-precious stones emanating from Idar-Oberstein, the renowned German stonecutting center, and including two shipments of diamonds, which latter are primarily responsible for the existing misunderstandings and the protracted litigation.

Reasons for Granting Petition for Rehearing

1. The pending trial of Ernst Cremer, petitioner's alleged co-conspirator under a 1942 indictment, arrested on October 26, 1966 while on a business trip in New York, will make possible the introduction of documents excluded by the lower court for lack of identification, and the introduction of new testimony.

On October 26, 1966, i.e., since the filing of the petition herein, there was apprehended in New York one Ernst Cremer who was named a co-conspirator with petitioner in a 1942 indictment under which petitioner was found guilty, fined and imprisoned for having made an allegedly wrong origin declaration. The indictment charged that diamonds received by petitioner's import firm, Pioneer Import Corp. (Pioneer), in New York in the 1940-1941 period, were not of German origin, as declared, but of

NOTE: Unless otherwise indicated, references herein are to the pages of petitioner's Appendix filed in the Court below and now on file in this Court.

Dutch or Belgian origin. Defendants allege that Cremer, the German Military Government in Belgium and petitioner were co-conspirators in marketing Belgian diamonds in U.S.A. The pending Cremer trial will prove that the diamonds were indeed of German origin. The trial will thus disprove the finding of the Honorable Edward C. McLean in the District Court that the diamonds were of Belgian origin (App. A-24).

Petitioner's counsel, on April 6, 1942, made a motion before the U. S. District Court for postponement of petitioner's trial until after cessation of hostilities so that documents and witnesses, unavailable while a state of war existed, might be introduced. The District Court, however, denied that motion.* The Cremer trial, placed on the court calendar for March 1967, will now do what petitioner's trial in the heat of war (1942) could not do. It will permit Cremer to identify the documents which were then not available or could not be introduced for lack of identification. Among them is the proof which was needed to acquit petitioner at the time. The Cremer trial will give the opportunity to introduce newly-discovered evidence which will conclusively prove that no Belgian or Dutch transactions took place, that the allegedly Dutch or Belgian diamonds were of German origin and that no Dutch or Belgian diamonds were shipped to or received by this petitioner or by his import firm, Pioneer. The pending Cremer trial will thus disprove the allegation that this petitioner was an agent of the German Occupation authorities in Belgium before America's entry into the war

* It is petitioner's contention that postponement of the wartime trial should have been granted. The law on the subject has been clearly laid down by the Supreme Court (*Watts* v. *Union Austriace*, 63 L. Ed. 100, 248 U. S. 9 and in re *Kaiser Wilhelm 2d*, 246 Fed. (C.C.A. 1017) 786.

on December 11, 1941, as Defendants have charged (p. 4 of their Memorandum in Opposition of November 1966).

Moreover, if Mr. Cremer is acquitted, it will, in retrospect, certainly have been a grave miscarriage of justice that petitioner, on the same set of facts, had been found guilty, fined and imprisoned for having made an allegedly wrong origin declaration*.

2. The revocation of testimony by T. U. Lemberg, the Government's principal witness in the diamond matter, became available only after conclusion of trial and the adverse decision.

On, or about, June 22, 1966, the day the Court of Appeals upheld the District Court's adverse decision in this case, the U. S. Department of Justice received a statement, dated June 15, 1966, supported by a Belgian document dated October 23, 1941, from Mr. Tidemann Ulrich Lemberg, a German certified public accountant and a Major of the Reserve in the Army, who had acted as an adviser to the German Military Government in Belgium in the 1940-1941 period in civil administration matters, and who was Cremer's superior. Major Lemberg's statement unequivocally revokes his previous testimony. Whereas he had testified that six packages of diamonds had left Antwerp for transshipment via Berlin to petitioner's firm, Pioneer, he now amends his testimony to the effect that the six packages never left Antwerp. This matter was made the subject of a motion to the

* From the standpoint of U. S. Customs revenue, it made no difference whether the stones were cut in Belgium or Germany as the rate of duty would be the same. If the stones were Belgian property, they were however subject to Executive Order 8389, the "freeze" order of May 10, 1940, 12 U.S.C., 95a note, which made it necessary to secure a license before paying for them.

lower court for a new trial which was denied by the Honorable Edward C. McLean on December 5, 1966 (New York Law Journal, December 6, 1966).

The Lemberg Confession of Error will give added meaning to the pending Cremer trial. It also supports the findings of the administrative court of the Department of Justice concerning this same property (Matter of 40 Consolidated Claims of Carrie M. K. Beir, et al., Dkt. No. 183, Office of Alien Property (1955))* in which the Chief Hearing Examiner of that Bureau, Mr. Harry LeRoy Jones, concluded (p. 167) that documents offered by petitioner

> "* * * establish beyond any doubt that all these diamonds were cut in Germany and that none came from either Belgium or Holland after those countries were overrun by the German army on May 10, 1940.
>
> The shipping documents also establish that the second and third shipments were not on consignment but were offered as purchased merchandise to Pioneer. Title therefore passed to Pioneer upon arrival of the goods at the post office."

It is noteworthy that the trial before the District Court in the summer of 1964 produced purely circumstantial evidence to indicate that dealings in diamonds owned by Belgian merchants took place between Imico,(**) Berlin,

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* These are related administrative proceedings which are still pending before the Office of Alien Property. The Chief Hearing Examiner's opinion was marked as Plaintiff's Exhibit B in the trial court. It is presently awaiting review by the Attorney General. *International Mortgage & Investment Corp.* v. *Von Clemm*, 301 F. 2d 857, 859 (2d Cir. 1962).

** "Imico" is the abbreviation for International Mortgage Handelsgesellschaft m.b.H, the Berlin exporting firm from which petitioner purchased his goods, and of which his twin brother, Carl, was one of the managing directors.

and Pioneer, New York, in the 1940-1941 period. No Belgian merchant has come forward in 25 years to lay claims to any such alleged shipments or testify in regard to them. Defendants have proven none of their hearsay allegations. Thus the District Court's verdict of November 24, 1965 in regard to the alleged Belgian shipments rested entirely on the testimony of the Government's witness, Major Lemberg, now revoked. As aforesaid, the Lemberg evidence will figure importantly in the pending Cremer trial, and thus give added weight to this petition for reconsideration.

The similarity and relationship of the pending Cremer trial to this case constitutes grounds for a rehearing within Rule 58 (2) (e.g. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34 footnote 1; *Massey* v. *United States*, 291 U. S. 608). The evidence in the possession of the government and the constitutional question, subsequently argued, represent "other substantial grounds available to petitioner although not previously presented" (e.g. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50).

3. Evidence in the possession of the Government would have established petitioner's right to recovery, but it was not presented to the lower court.

The District Court stated (App. A-42):

> "Von Clemm did testify that he went out of business after December 11, 1941 and that he so notified Lambercier(*). He testified that Lambercier

* Georges Lambercier, 5 Rue Madame de Stael, Geneva, Switzerland, stone dealer, was petitioner's Swiss purchasing agent and shipper (App. A-59 to A-62, A-72, A-73). Commerce between Switzerland and U. S. A. continued throughout the war (U. S. Dept. of Commerce statistics).

> insisted on shipping more goods to Bridge, whereupon I not only wrote letters and said "we are in difficulties; do not ship any more goods", but we accompanied this endeavor to make him desist from shipments by a telegram in which we specified that no goods were to be shipped * * *.' No such letter or telegram was ever produced, nor was the failure to produce them satisfactorily explained. In view of their crucial importance, the failure to produce them militates very strongly against the credibility of von Clemm's oral testimony(*)."

The vital telegram, Claims Branch Exhibit No. 272, referred to by the District Court was indeed in the Government's possession. The Government, in fact, introduced it sometime in the 1949-1956 period before the Administrative Court. It was quoted by the Chief Hearing Examiner of the Office of Alien Property as Finding of Fact No. 387 in his Recommended Decision, dated April 9, 1959, *supra*.

The telegram, dated January 23, 1942, was addressed to Anton Baccala, Alpenstrasse 41, Bern-Wabern, Switzerland, owner of a lapidary shop whom Lambercier had recommended to petitioner as a supplier of synthetic stones of *Swiss* manufacture. It read:

> "AB3 REFER AB1 DONT SHIP ANY MERCHANDISE. SEND PROFORMA INVOICE COVERING SAME FOR LICENSE APPLICATION WITHOUT WHICH IMPORT PROHIBITED."

This exhibit which demonstrated petitioner's veto of shipments unless licenses were secured should have been

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* "It is true that von Clemm's files were seized by the government apparently long before this action was begun, and remained in its possession * * *. If these important documents existed, he should have found them. There is no reason whatever to suspect that the government suppressed them."

made available to the court so that judicial notice might be taken of it. The Government certainly knew of it, for it was the Government who had introduced it in the administrative proceedings which antedated the present trial. Petitioner failed to introduce it because he could not find it. The court, on the other hand, would not be guided by the Hearing Examiner's findings.

POINT I

The Constitutional Issue.

The lower court has ignored the Fifth Amendment, Article 3, and Article 1 of the U. S. Constitution.

This case involves claims under the Trading with the Enemy Act which were timely filed over twenty years ago by a resident citizen who immigrated to America over 44 years ago. This petitioner is a non-enemy by virtue of citizenship and residence, and has neither been charged with, nor convicted of a violation of the Act. The lower court has nevertheless disqualified him from asserting his claims under Section 9(a) of the Act by declaring him an "enemy-agent" within the meaning of Section 2(b) of the Act in that he failed to prove a "negative"(*). Petitioner maintains that he never was an "enemy-agent" and that the burden of proof placed on him in this respect is an unconstitutional burden.

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* The District Court states (App. A-39):

"The question must be decided upon the evidence in the present case, bearing in mind that the burden is on plaintiff to prove a negative, i.e., that he was not an enemy. The evidence as to the affirmative acts of Von Clemm after December 11, 1941 is not extensive."

The Fifth Amendment of the U. S. Constitution.

Petitioner invokes the protection of the Fifth Amendment of the United States Constitution which in a recent work(*) by the Dean of Harvard Law School was thus summarized (pp. 1, 2):

> "The Fifth Amendment * * * is the source of our constitutional rule that serious criminal charges must be made by indictment of a grand jury. It provides that no person shall be * * * deprived of * * * property without due process of law, and that private property shall not be taken for public use without just compensation. * * * No person * * * shall be compelled in any criminal case to be a witness against himself."

Dean Griswold then makes the following suggestion (p. 76):

> "Our approach to the Fifth Amendment need not be wholly in terms of defending and explaining it. We may also utilize it, in a sense, offensively, as a reminder of the necessity of maintaining constant vigilance for the protection of individual rights. As a symbol, the Fifth Amendment can be a guide to a number of things which we should be doing better, and which we as members of the bar might well be doing to improve."

This is a civil case based in its present phase on the Government's contention that a criminal act took place. The Government accuses petitioner of having been an "enemy agent", an infamous crime in wartime. But the

* *The 5th Amendment Today,* Three Speeches by Erwin N. Griswold, Dean and Langdell Professor of Law, Harvard Law School, Harvard University Press, Cambridge, 1955, Library of Congress Catalogue Card Number 55-6809.

Government would not formally charge petitioner with such a crime because it knows that it could not bring such accusation before a grand jury and hope to prevail (App. A-40).

The Government would thus deprive this petitioner of his property without due process of law, and it would take his property for public use (in lieu of reparations owed by the German government) without just compensation. The Government would do so by the artful dodge of placing the burden of proof in regard to the absence of the alleged criminal act on petitioner, a pre-sixteenth century method, antedating the maxim of English common law, "Nemo tenetur prodere se ipsum" (Dean Griswold's book, supra, p. 2). The lower court has upheld this process of turning the clock back by forcing petitioner in this civil case to "prove a negative", and by then finding that such proof was not furnished. The lower court thus believes to have avoided the restrictions of the Fifth Amendment. Whether it acted properly is the paramount question before this Court. A further quotation from Dean Griswold's book, supra, is here in order (pp. 6, 7):

> "* * * the privilege (against self-incrimination) was generally recognized in the colonies after it had become established as a part of the common law of England * * * it was included in the proposals made by Congress which became the Fifth Amendment in 1791, and it has been there unchanged ever since. * * * I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized * * * the privilege is closely linked historically with the abolition of torture * * *."

Article 3 of the U. S. Constitution.

Defendants (footnote, page 8, of their November 1966 Memorandum in Opposition) state:

> "Manifestly, the term (enemy agent) includes one who, like petitioner, knowingly renders economic aid to a country with which the United States is at war * * *"

The accusation, false as it is, infra, Point V, puts this case clearly within the wording of Article 3, Section 3, Clause 1, of the Constitution of the United States, which reads:

> "Treason against the United States shall consist * * * in adhering to their enemies, giving them aid and comfort * * *"

The Government cannot have it both ways. If petitioner was a traitor he should be treated as such. Criminal law, not civil law, must apply. The lower court should have so considered. In upholding defendants, it has acted in violation of Article 3 of the Constitution, supra, which in its lower portion reads:

> "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

There were no two witnesses to the alleged overt act, nor was there a confession in open court.

The lower court is moreover in violation of the provision of Article 3, Section 3, Clause 2 of the Constitution, which states:

> "The Congress shall have power to declare the punishment of treason * * *"

Article 1 of the U. S. Constitution.

Section 5 of the Trading with the Enemy Act, Appendix, was amended by Act of Congress of December 18, 1941 c. 593, Title III, Section 301, 55 Stat. 839, and such amendment became applicable to Sections 1-31 of that Appendix (the Act). *Draeger Shipping Co.* v. *Crowley,* D.C.N.Y. 1943, 49 F. Supp. 215; *Standard Oil Co. et al.,* v. *Clark,* 163 F. 2d 917 (2d Cir. 1947) *cert. denied* 333 U. S. 873 (1948), 925.

Prior to the amendment, petitioner's property could not have been vested. As a resident-citizen of the U. S. A. he was not an "enemy" within the old wording of Section 5(b). Hence the question whether he might be an enemy under Section 2 of the Act was, prior to December 18, 1941, academic.

That the Honorable Edward C. McLean based his opinion and decision on *past conduct* is apparent from his finding (App. A-38):

> "I conclude, therefore, that at least until December 11, 1941, Von Clemm was an agent of the German government within the meaning of the Act."

> "This brings us to the second and more difficult phase of the problem. Was Von Clemm an agent of the German Government after December 11, 1941? Unless he was, he was not an enemy as the Act defines that term."

The lower court in finding petitioner an enemy-agent prior to December 11, 1941, on the basis of alleged conduct which antedated the amendment of Section 5(b) of the Act is clearly in violation of the ex post facto provisions of Article 1, Section 9, Clause 3 of the U. S. Constitution.

Judge McLean moreover conceded (App. A-40):

> "• • • if the burden of proof were upon the government, it is by no means clear • • • that Von Clemm acted on behalf of the German Government after December 11, 1941."

The lower court has termed this case an "unusual case". Indeed, it is. In denying the right of this petitioner to come forward and claim his property under Section 9(a) of the Act, the lower court has engaged in reasoning both stilted and violative of the Constitution of the United States. (It took the court 18 months to write the decision.) In placing the burden of proof on petitioner that he was not an enemy agent, the lower court is in violation of the Fifth Amendment and Article 3 of the Constitution. In deciding the punishment (confiscation) it is in violation of Article 3 of the Constitution in that it has usurped congressional powers. In considering "past conduct" it is in violation of Article 1 of the Constitution in that the present Trading with the Enemy Act is ex post facto.

It is the purpose of this request for a rehearing to ask this learned court to review the lower court's decision in the light of the above. It is petitioner's position that a plaintiff in a civil case may not be defeated by a criminal charge in regard to which he has not been tried. It is petitioner's position that a charge of treason is subject to the dictum of Article 3 of the Constitution and that it cannot, considering that it is an infamous crime, be hurled in a civil case at a resident-citizen-claimant under the guise of the Trading with the Enemy Act without violating the Due Process requirements of the Fifth Amendment and Article 3 of the Constitution—all for the plain and obvious purpose of confiscating a resident-citizen's property in defiance of the United States Constitution and in utter disregard of internationally valid concepts of law.

POINT II

Summary of Background of this Case.

Petitioner's firms, Pioneer Import Corp. and Bridge Import Co., were vested by the Alien Property Custodian in November 1942. Petitioner filed his claims with the Alien Property Custodian in late 1943. The hearings on the consolidated claims under the Administrative Procedure commenced before the Department of Justice, Office of Alien Property, Hearing Examiners' Branch, in late 1949. Due to the fact that several corporate entities were involved and that the title claims were complex, the hearings went on intermittently for over 9 years. The hearings concluded early in 1959. The Chief Hearing Examiner, before whom the hearings took place, rendered his Recommended Decision, covering 171 legal-size pages, on April 9, 1959, supra. In it he stated on the question of petitioner's eligibility (p. 168):

> "Von Clemm's eligibility to a return * * * has been vigorously denied by the Chief of the Claims Section ever since the inception of these proceedings in 1950. He is attacked as an agent of Germany and therefore an enemy as defined in Section 2 of the Act * * *. Von Clemm was never determined by the Custodian in any vesting order to be an enemy; consequently the burden of establishing his enemy status, in view of his residence in the United States during the war, rests upon the Claims Section.
>
> 'Agent' is a very loose word; it is popularly used in many senses, some with a meaning almost opposite its legal meaning, for example, as in saying that a person is a 'free agent'. The fact that Von Clemm for Pioneer was given the exclusive franchise for

importing Idar-Oberstein products under Germany's controlled economy does not make Von Clemm an agent of the German government. He was obviously never 'subject to the control' of the German government as a principal, a requirement of agency as defined in Section 1 of the Restatement of Agency. Von Clemm was working for Von Clemm and nobody else. Just how hard he was working for Von Clemm appears in the Groups I and II findings and opinions.

That Von Clemm's commercial transactions resulted in benefit to the German economy prior to December 11, 1941 does not make them other than legitimate commercial transactions."

Petitioner settled in America 44 years ago, became an importer in 1933 (like so many immigrants before him), married an American girl (of British parentage), raised a family and paid his taxes. Petitioner, now a widower, has a son and a daughter, both born and raised in the United States. His son was graduated from Phillips Exeter Academy with honors as class historian and subsequently cum laude from Harvard University. He earned his Doctor of Literature degree at Corpus Christi College in Oxford, England, after spending two years on a research project in Africa which he carried on under a Ford Foundation grant awarded to him. He is married to an American girl, has two children, and is now an officer of the First National City Bank, stationed in London, England. Petitioner's daughter was graduated with honors from Springside School, Chestnut Hill, Pa., continued her studies at Vassar College and in Florence, Italy. She is married and has two children. Her husband is at present Headmaster of the English-Speaking School in Bern,

Switzerland. These facts are mentioned merely to indicate the solid American background of petitioner's family.

In 1938 petitioner organized Pioneer Import Corp. to import sundry merchandise from Germany. Originally he imported such items as rayon staple fibre, hops, lily of the valley pips, sundry chemicals, and also some consumer items (App. A-13), among these synthetic and semi-precious stones. With the outbreak of the European war in the fall of 1939 petitioner reduced his import activity to synthetic and semi-precious stones which could be shipped by registered mail and were thus less apt to be affected by British blockade measures. As a result of inquiries from his American clientele, he added diamonds to his list of potential imports as such fitted in with his other ringstone business. His inquiries about diamonds antedated the invasion of the Lowlands by the German army. No shipments had however been made until this event occurred. It is here where the problems started which petitioner with confidence expects will be solved 25 years later by the pending Cremer trial.

POINT III

The German licensing system did not put petitioner under the "direction of the German government".

In the period under advisement (1938-1941) no shipments could leave Germany without German governmental licenses. The licensing system, in fact, dated back to 1930 when, as a result of the great depression, rigid foreign exchange controls, which were purely domestic, were enacted in Germany. The lower court has equated

such controls with "direction of the German government" over the American importer, for its states (App. A-38):

> "The evidence as a whole, only part of which I have recited here, makes it clear that these stone transactions were carried on at the direction of the German Government through the medium of Imico and Pioneer * * *"

The record is however bare of any proof to support the court's opinion that the import transactions of Pioneer "were carried on at the direction of the German Government".* Although the United States Justice Department, Overseas Branch, with head office in Munich, captured German government documents at will, it failed to introduce a single exhibit which would prove "direction of the German Government" of petitioner, or of Pioneer. The U. S. State Department was in favor of trade with German industry, controlled or not, for it wrote petitioner as late as April 10, 1940, over the signature of its chief legal adviser, Green H. Hackworth, subsequently United States

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* The District Court (App. A-37) pondered petitioner's motives for being in business. The Court suggests that petitioner had "a desire to be of service to Germany", rather than seeking "a personal profit out of his transactions". In explanation the Court points to Pioneer's 1939 and 1940 income tax returns which showed losses for these periods. While it would not be unusual for a business venture to be unprofitable in its first year, Pioneer tax returns for 1940 and 1941 were subsequently amended to show very substantial income and corresponding tax payments (Tr. p. 3408).

The real gain is, however, represented by the sums tied up by the government. It would seem odd to take a merchant's goods, deprive him of his profits and then propound that the lack of profit proves that he was not a businessman but a government agent. Only prejudice will deny that petitioner took advantage of a business opportunity. The moneys held in the U. S. Treasury prove the correctness of his judgment. He ran the British blockade for profit. He had everything to gain by meticulously abiding by the license requirements of his own government. This he did.

member of the International Court in the Hague, Netherlands (App. A-78, A-124, A-125):

> "* * * You may be assured that the Department is doing all that it can to assist American importers of German goods * * *" (Plaintiff's Exhibit 84).

POINT IV

Petitioner was not a German agent before or after December 11, 1941, and was never termed such in any of the vesting orders which issued in the 1942-1948 period.

Petitioner was an importer, not an "enemy agent", and he stopped paying his bills to Germany (or Switzerland) on June 14, 1941. Thus petitioner did not aid Germany, not yet an "enemy", under any stretch of imagination, subsequent to June 14, 1941. (See Point V, infra.)

The word "agent" appears in section 2(b) of the Act in conjunction with the words "the government of any nation with which the United States is at war", "any political or municipal subdivision thereof", "any officer, official * * * or agency thereof". Since the Act was conceived as a protective measure so that property under the control of the enemy or his allies could not be utilized for the benefit of the enemy, it follows that the word "agent" in Section 2(b) is the equivalent, and descriptive of, one who serves the enemy government in a paid capacity or who handles that government's funds as a fiscal agent. The word certainly does not connote an American citizen engaged in the import business for private gain, whether his exporters operated under government licenses or not*.

* Petitioner, an importer, engaged in purely commercial activities, was never asked nor required to register under the Foreign Agents

As was said in the main petition (p. 16) we have found no case in which a claimant was held ineligible to seek recovery under the Trading with the Enemy Act because he could not prove a "negative", that is, furnish affirmative proof that he was not an enemy agent. When the claimant, as here, proves that he is a U. S. resident and citizen, and denies the allegation that he is an enemy agent, the burden of going forward with evidence to prove the contrary should be upon the Government.

The District Court in its conclusion (App. A-35) states:

> "The act does not define the word 'agent'. The few judicial decisions in this field do not discuss the definition in any detail."

The District Court then cites *Sarthou* v. *Clark*, 78 Supp. 139 (S.D. Cal. 1948); *Hansen* v. *Brownell*, 234 F. 2d 60 (D.C. Cir. 1956); *Stadtmuller* v. *Miller*, 11 F. 2d 732, 733, 734 (2d Cir. 1926); *Rusche* v. *Brownell*, 136 F. Supp. 835 (D.C. 1955), aff'd, per cur. 244, F. 2d 782 (D.C. Cir. 1957).

The decisive aspect of these cases was the question of *domicile*. Claimants Stadtmuller and Rusche (not charged with agency) won or lost, depending on the court's interpretation of "domicile". The decisions, in those cases where agency existed, Sarthou and Hansen, clearly pinpointed the meaning of the word "agent" within the association of words and phrases in Section 2(b) of the Trading with the Enemy Act. Claimants Sarthou (Von Neindorff) and Hansen were paid servants in the employ

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Registration Act of 1938. This act, as it was in effect from August 7, 1939, 52 Stat. 1245, until April 29, 1942, 53 Stat. 249, specifically excluded from its definition of "agent of a foreign principal" any person "performing only private, non-political, financial, mercantile or other activities in the furtherance of the bona fide trade or commerce of the foreign principal".

of the German government, or of its propaganda agency, "Rundfunk". They worked, and were domiciled, within the Central-European war-theater. What disqualified them was the double factor of the wrong domicile and the wrong activity, the latter truly descriptive of the meaning of Section 2(b). Sections 2(a) and 2(c) of the Act are not directed at citizens of the United States, resident in U. S. A. While the President of the United States may, by proclamation, include within the term "enemy" any individual, he may not do so in the case of a citizen of the United States. Thus, in the absence of the element of "cloaking", the burden of proof of a resident-citizen-claimant in regard to Section 2 is satisfied through citizenship and domicile. Petitioner is both a citizen of the United States and a permanent resident of the U. S. A. for the last 44 years.

And, as the Chief Hearing Examiner of the Office of Alien Property pointed out in his Recommended Decision (p. 168), "Von Clemm was never determined by the Custodian in any vesting order to be an enemy". (See Point II, *supra.*)

Petitioner cannot be found to be an "agent" of the German government merely because (1) that government controlled and regulated German industry, and petitioner, through Imico, purchased goods from such industry; or (2) petitioner or his supplier obtained licenses from German governmental agencies to export goods. In finding petitioner a "German agent" prior to Pearl Harbor, the lower court applied a subjective viewpoint. In regard to agency subsequent to Pearl Harbor, the lower court admits it lacks proof (App. A-40).

POINT V

The purpose of the Trading with the Enemy Act was observed by petitioner.

The lower court, quoting from *Stadtmuller* v. *Miller*, 11 F. 2d 732, 733-734 (2d Cir. 1926) stated with utmost pertinence (App. A-36):

> "The purpose of the Act has been said to be 'to make it impossible to aid the enemy (Germany) by forbidding that money or property of any kind held in the United States should reach the hands of the enemy. The intention was to make it impossible for a dollar to inure to the advantage of Germany'."

Actually the statement is incomplete in that it omitted the words "except with license from the President". That it was proper to engage in licensed trading with the enemy becomes apparent from a reading of the Act and of its legislative history. In his report to the Senate, 65th Congress, 1st Session, Calendar No. 115, Report No. 113 (to accompany H.R. 4960), Mr. Ransdell, from the Committee on Commerce, spoke of the purposes of the Act at the time it was inaugurated in 1917, and stated (p. 1):

> "The purpose of this bill is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on * * * The spirit of the act is to permit such business intercourse as may be beneficial to citizens of this country, under rules and regulations of the President, which will prevent our enemies and their allies from receiving any benefits therefrom until after the war closes, leaving to the

> courts and to future action of Congress the adjustment of rights and claims arising from such transactions * * *"

Mr. Ransdell then set forth (pp. 4-8) under what conditions business intercourse may take place. At page 4 he stated:

> "Any form of trade with the enemy which is made criminal by section 3 may be performed under license from the President granted either to the person engaged in the trade or to the enemy person himself. Full provisions for licenses to be issued by the President are found in section 5 * * *"

Similar performance under license was authorized by Sections 4, 5, 7 and 10 of the Act, and such licensed performance was never affected or rescinded by subsequent amendments of the Act. It is thus clear that application for licenses were at all times proper after December 11, 1941, and that trading with the enemy was legal, provided such applications were granted.

Defendants, in the concluding footnote of their Memorandum for the Respondents in Opposition of November 1966 (p. 8) state:

> "* * * The Act defines enemy to include an agent of an enemy government; see note 2, supra. Manifestly, the term includes one who, like petitioner, knowingly renders economic aid to a country with which the United States is at war, for the basic purpose of the Act was to keep assets and other resources from those countries. *Uebersee Finanz-Korp.* v. *McGrath,* 343 U. S. 205; *Clark* v. *Uebersee Finanz-Korp.,* 322 U. S. 480, 484-485."

Your petitioner fully agrees with defendants' definition of "the basic purpose of the Act". Petitioner, however,

disputes—and vehemently so—the contention that he was one who "knowingly renders economic aid to a country with which the United States is at war". Petitioner's books (for 18 months in the lower court's possession) and the evidence in the case (App. A-77 to A-80), incontestibly prove that payments in the discharge of commercial obligations, the only "economic aid" ever given Germany by petitioner, were not made subsequent to June 14, 1941, fully 6 months before the United States entered the war. Defendants' statement is thus clearly untrue and self-serving. Petitioner at all times understood, agreed with and observed the purposes of the Trading with the Enemy Act.

POINT VI

The lower court's decision threatens the established order of property rights.

As it now stands, the lower court's decision will endanger every American-born businessman who opens an import firm in a foreign port. His American connections, his representation of American firms, could conceivably be cited at will by the foreign government to confiscate his goods under its nationalization statutes. The charge would require no more than the assertion that the trader's background makes him an American agent within the meaning of *Von Clemm et al., v. Smith et al.*, should the present decision remain unrepealed and become the law of the greatest trading nation in the world.

The lower court's decision, if allowed to stand, thus endangers the structure of Western beliefs; but it also tramples on the two cardinal principles which protect the

United States resident, i.e., every man is presumed innocent until he is proven guilty, and private property shall not be taken for public use without just compensation.

Unless the broad constitutional question here involved is ruled on, it is foreseeable that this case will have the widest domestic and international repercussions. Domestically it puts in jeopardy respect for constitutional principles. Internationally it will tempt every potentate from Jakarta through Cairo to the developing countries of Africa and South America to establish legislation which will place a heavy burden on the trader. There is moreover reason to believe that European countries where American investment is most heavily concentrated will find considerable interest in this decision. There too are would-be leaders in the wings who would change the carefully-established order of things.

POINT VII

The lower court's decision is discriminatory if measured by historical standards of adjudication.

The decision of the lower court is discriminatory and punitive within the meaning of previous court decisions. In *Cummings* v. *The State of Missouri,* U. S. Reports, 71 Wall 4 (1866) the court said (p. 330, 331):

> "A question arose in New York, soon after the treaty of peace of 1783, upon a statute of that State, which involved a discussion of the nature and *character of these expurgatory oaths, when used as a means of inflicting punishment of past conduct.* The subject was regarded as so important * * * that it engaged the attention of eminent

lawyers and distinguished statesmen of the time, and among others, of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which with his characteristic fullness and ability, he examines the oath and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guarantees, secured by the Revolution, of the rights and liberties of the people." (Emphasis provided.)

"'If we examine it' (the measure requiring the oath) said this great lawyer, 'with an unprejudiced eye, we must acknowledge, not only that it was an evasion of the treaty but a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and instead of obliging the State to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty'."

The lower court's insistence that petitioner prove a "negative" is analogous to the demand for an expurgatory oath in the *Cummings* case, supra. The aim is the same. The device is used "as a means of inflicting punishment of past conduct". Petitioner denies that he ever was a German agent, but the lower court insists that he purge himself by proving that he stopped being one after Pearl Harbor! It admits that it lacks evidence to support such agency after Pearl Harbor but it demands the "expurgatory oath", nevertheless.

The harshness of the present court decision is also in complete contrast to established court philosophy. In *Stadtmuller* v. *Miller,* 11 F. 2d (2d Cir. 1926), cited by the lower court, Judge Rodgers, who wrote the *Stadmuller* opinion, spoke of interpretation of the law (Trading with

the Enemy Act) (p. 735). He said, with pointed reference to the problems posed in cases arising under the Act:

> "In *United States* v. *Kirby,* 7 Wall 482, 486, 19 L. Ed. 278, Mr. Justice Field, writing for the court, said: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter * * *'."
>
> "To hold that * * *, loyal to the United States throughout the war, was nevertheless an enemy, whose property might be taken from him, is such an unreasonable and oppressive construction, and so repugnant to common sense, common justice, and common honesty, that we shall not so decide, unless compelled to do so."

In *Seested* v. *Post Printing & Publishing Co.,* 31 S.W. (2d), 1045, although not arising under the Trading with the Enemy Act, the Supreme Court of Missouri found for plaintiff, a naturalized German-American citizen who had lived in U. S. A. for more than 40 years. The Supreme Court affirmed the lower court's awards of compensatory and punitive damages against the publishing company which had smeared *Seested* with the accusation of "pro-German" sympathies. In this case as in the *Seested* case the families were firmly established in America and of unquestioned loyalty. The court in the *Seested* case considered this important aspect and found (p. 1052):

> "The relations existing between a husband and father on one side and his wife and children on the

> other are such that it may reasonably be inferred that their conduct and activities, under the stress of war conditions, fairly reflected his state of mind with reference to such conditions. The evidence was therefore both relevant and competent as tending to establish plaintiff's loyalty during the war * * *."

A United States citizen, at all times resident in U. S. A. during the war period, cannot be deprived of his property on mere suspicion of enemy sympathies. In *Kotoshira Jinsha* v. *McGrath,* 90 F. Supp. 892, the court said:

> "We have not yet come to the point * * * nor will we ever while 'this court sits' * * * where the government can take away a person's property because it does not approve of what that person believes in or teaches by way of religion or philosophy of life."

These sentiments were also voiced by the United States Supreme Court. In *Guessfeldt* v. *McGrath* (342 U. S. 308), Mr. Justice Frankfurter, who wrote the majority opinion, observed (p. 319):

> "* * * considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited. Instead of a carefully matured enactment, the legislation (Trading with the Enemy Act) was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes * * *."

POINT VIII

The law as to the burden of proof is not "well settled", as defendants claim.

The lower court did not charge petitioner with being an enemy agent after December 11, 1941, but stated (App. A-43, A-44):

> "• • • Von Clemm had failed to prove that he was not an agent of Germany, within the meaning of the Act, after December 11, 1941, and hence that he may not maintain this action under Section 9(a)."

Thus the lower court demanded proof of a "negative", that he was no such agent. As was submitted in the petition before this learned court, this is an unconstitutional burden. Actually, petitioner's burden is met by the established and uncontested fact that not a penny of revenue reached the enemy from petitioner, or from his firms, after June 14, 1941.

The lower court relied on this Court's decision in placing the burden of proof on this petitioner and cited in this respect *Societe Internationale* v. *Rogers,* 357 U. S. 212, 213 (1958). Yet it is subject to doubt what this Court meant by "burden of proof" in regard to claimants under the Trading with the Enemy Act. In the *Societe* case, *supra,* this Court stated:

> "In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an 'enemy' within the meaning of the

> Trading with the Enemy Act • • • (b)ut these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits" (p. 212).

If read in context the burden there placed on claimant *Societe* was one of title under Section 9(a) via Section 5(b) and not of eligibility under Section 2. *Societe* was a "national" under Section 5(b) of the Act, and allegedly an "enemy" under Section 2(a) of the Act, of which this Court said (p. 212):

> "The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner."

Yet, *Societe* was not disqualified by the Supreme Court from being heard "on the merits" in order to establish its claims to beneficial title in "the General Aniline stock and other assets". Its status under Section 2 of the Act was not even an issue in this Court's deliberations although the Nazi tinge on the case was heavy. As the case was settled out of court, the question of what this Court meant by "burden of proof"—whether it referred to title or to eligibility—must remain open to conjecture.

In *Manufacturers Trust Company* v. *Kennedy*, 291 F. 2d 460 (2d Cir. 1961), the other case cited by the District Court in support of the "burden of proof" question, the court sitting on the case unambiguously expressed that the burden to be borne by plaintiffs went to the question of beneficial ownership and not to the question of enemy status as dealt with in Section 2 of the Act. The court said (p. 467):

> "The burden which appellants must here sustain consists of a showing that they were the beneficial owners of the fund sought. *Le Due & Co.* v. *Rogers,* 7 Cir. 259 F. 2d 905; *Feller* v. *McGrath,* D.C.W.D. Pa., 106 F. Supp. 147, affirmed sub. nom. (and other citations)."

(p. 468): As was stated in *Feller* v. *McGrath, supra,* 106 F. Supp., at page 149:

> "Section 9(a) of the Trading with the Enemy Act requires that a plaintiff 'establish' the interest, right, or title he claims. This means plaintiff has the burden of establishing that he is the beneficial owner of the property involved * * *. Beneficial ownership is the heart of the case; it is part of plaintiff's prima facie case."

Accepting the viewpoint of plaintiffs in the *Societe* case, *supra,* and referring to the December 18, 1941 amendment of Section 5(b) of the Act, this Court found (p. 925):

> "* * * the effect of the change in law is to enable the government to meet the real evil of the cloaking of enemy property interests by apparent holdings by nationals of friendly powers. Seizure is permitted against such nationals, who can then secure a return only upon showing that the property is genuinely their own."

This Court thus clarified the essential meaning of the expression "burden of proof" as applied in its decision and as applicable to claims arising under the Trading with the Enemy Act. The burden is one to show "that the property is genuinely their own". Such burden is one of title, and not of eligibility.

In their Memorandum in Opposition (p. 2) defendants state:

> "We submit * * * that the law as to the burden of proof is not only reasonable but well settled."

and in their footnote, p. 8:

> "It is apparent that no novel or important question is presented in this case as to the scope of the Trading with the Enemy Act."

These are self-serving declarations. The law as to the burden of proof is well settled only in the Fifth Amendment of the Constitution of the United States. Thus this case presents a novel and important question.

The Government has failed to cite a single case arising under the Trading with the Enemy Act in which the burden of proof was on the *resident-citizen claimant* other than in respect to the question of the true ownership of what he claims. Every case cited by defendants (p. 3 of their Memorandum in Opposition) shows this to be true. The criterion in these cases is domicile and beneficial ownership. The eligibility of these *resident-citizen claimants* to claim title was not questioned (*Duisberg* v. *United States,* 89 F. Supp. 1019; *Halbach* v. *Markham,* D.C.N.J. 1952, 106 F. Supp. 475, affirmed 207 F. 2d 503, certiorari denied 74 S. Ct. 628, 347 U. S. 933, 98 L. Ed. 1084, *Manufacturers Trust Co.* v. *Rogers,* 81 F. Supp. 467, 468, *Stoehr* v. *Wallace,* 255 U. S. 239.

The proof of non-enemy status under the Act is one of showing domicile in the United States throughout the war, and proof of beneficial ownership in respect to the property claimed. No case exists where a resident-citizen claimant was termed ineligible under Section 9(a) of the Act—unless he purged himself from a criminal charge for which he had neither been tried nor convicted. Acting as agent of the enemy in wartime is such a crime. It is here where the *Cummings* case, *supra,* is directly in point.

Defendants, again for self-serving purposes, state (p. 3 of their Memorandum in Opposition):

> "This Court has expressly upheld the fairness of the procedures of the Act against a challenge that it violated a citizen's Fifth Amendment rights. *Stoehr* v. *Wallace*, 255 U. S. 239."

But that case is incorrectly cited! There the issue was one of title, and *not a denial of the right to be heard on title*. The *Stoehr* case was cited by this Court in *Societe Internationale* v. *Rogers*, 357 U. S. (1958), in which this Court said (pp. 210-211):

> "* * * Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 318; cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489."

This petitioner, an American citizen permanently domiciled in U.S.A. for 44 years, is a non-enemy claimant within the meaning of the Act, just as claimants Societe and Stoehr were. It is here where this Court, in its wisdom and fairness, must find that the lower courts have made a mistake. American justice and American fair play so require. One cannot have worked hard—very hard—for 44 years only to find that the fruits of one's labors are taken by an artful dodge, and without even giving thought to compensation as required by the Constitution.

> "Summary power to seize property * * * is rescued from constitutional invalidity * * * only by those provisions * * * which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure." (*Societe* case, *supra*, pp. 210, 211).

The resident-citizen is a non-enemy claimant even if he were a common criminal. Only a wilful violation of the Act** can bring on forfeiture, and only *upon conviction.* The Government was entitled to seize while the war was on (Section 5(b) of the Act, as amended); thereafter, the resident-citizen claimant must be given a judicial hearing as to the propriety of the seizure.

POINT IX

The Paris Convention of 1954 has made no provisions for relief of claimants in petitioner's category.

This petitioner, an American resident-citizen, has no other place to turn. The Paris Convention of 1954, more specifically known as the "Convention on the Settlement of Matters Arising Out of the War and the Occupation", laid down in the "Protocol on the Termination of the

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** *50 U. S. Code, App., Section 16, offenses; punishment; forfeitures of property.*

Whoever shall willfully violate any of the provisions of this Act * * * shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and * * * any property, * * * concerned in such violation shall be forfeited to the United States. Oct. 6, 1917, c. 106, Section 16, 40 Stat. 425.

Occupation Regime in the Federal Republic of Germany", signed at Paris on October 23, 1954*, states:

> *"Chapter Six. Article 3:*
>
> 1. The Federal Republic shall in the future raise no objection against the measures which have been, or will be, carried out *with regard to German external assets* or other property seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany. (Emphasis provided.)
>
> *Article 5:*
>
> The Federal Republic shall insure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated."

The Convention thus recognized the principle of compensation for the victims of our confiscation of German external assets during World War II. It put the burden of such compensation on the Federal Republic of Germany. It did so in order to stay within the teachings of the Fifth Amendment of the U. S. Constitution, which teachings are also incorporated in the post-war constitution of the Federal Republic of Germany.

The protocol, however, does not cover a person such as petitioner, an American citizen, resident in U.S.A.; the German government has so ruled. The District Court's decision thus leaves petitioner in "no-man's land". As it

* "Return of Confiscated Property", Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 83rd Congress, Second Session on S. 3423, U. S. Govt. Printing Office, Washington, 1954 (No. 50478), pp. 128-130.

now stands, it not only denies him due process over here but gives him no access to the relief provisions, arranged by the Paris Convention abroad. His property, if taken, will pay German reparations, but the German government will owe him nothing. It has bound itself to make amends only in regard to *German* external assets.

Conclusion

As was submitted in concluding the main petition, the District Court, affirmed by the Court of Appeals, violated the Fifth Amendment to the United States Constitution by imposing upon petitioner an impossible, an unreasonable and an unauthorized burden of proof—thus branding him a traitor and depriving him of his property without due process of law. This statement did not go far enough. Beyond the question of due process lies the cardinal principle of the civilized world and of the Fifth Amendment of the United States Constitution, "nor shall private property be taken for public use, without just compensation". Without statutory forfeiture as prescribed in Section 16 of the Act this principle must remain inviolate. It covers the resident-citizen in our midst.

Petitioner has devoted 25 years of his life to regain his property which, but for the war and petitioner's German background, would never have been touched. Petitioner has expended his energies and fortune on this endeavor. All he asks for is that he be *heard* on his title claims under Section 9(a) of the Act.

The Fifth Amendment "is the source of our constitutional rule that serious criminal charges must be made by indictment of a grand jury" (Point I, *supra*). The lower court concedes (App. A-40) that it lacks the substance for

such indictment. Instead it places the burden to prove a "negative" on petitioner. This is an impossible burden. As was pointed out, Point IV, *supra,* even the President of the United States lacks the power to include an American citizen within the term "enemy" (Sec. 2(c) of the Act).

The District Court's verdict, and the libelous press campaign released in its wake, has stamped this petitioner with the stigma of a Benedict Arnold and has all but destroyed the name and fortunes of an immigrant citizen whose friendships in the country of his choice were broadly based, and whose loyalty to his adopted country has, in the more than 44 years of his American domicile, never been questioned. Thus this simple denial of a property claim has gone further than the lower court undoubtedly intended. With his standing in the community lost, petitioner finds it difficult to meet his own children.

If a claim to property, legitimately acquired, could be defeated only by rejecting the claim on the basis of a finding tantamount to a charge of treason, then the court, in fairness, should have offered an alternative. To deny both property claim, and the alternative, puts in question the adequacy of the legal system. The District Court's demand that petitioner prove a "negative", i.e., that he was not an "enemy", is an unconstitutional burden placed on petitioner in that it violates the Fifth Amendment, and, in the words of Alexander Hamilton, it "obliges the citizen to establish his own innocence to avoid the penalty". To charge petitioner with treason "unless on the testimony of two witnesses to the same overt act, or on confession in open court" is moreover a clear violation of Article 3 of the Constitution. Defendants, supported by the lower

court, would ignore both. The court moreover acted *ex post facto*. It would punish petitioner on the strength of the amended Section 5(b) of the Act which Congress did not enact until December 18, 1941 (see Point I, *supra*).

This learned Court has under circumstances analogous to this case acted affirmatively on a petition for a writ of certiorari. Although the suspicion that the claimants in the other case were acting as agents of Germany was deep-seated and strong, this court in *Societe Internationale* v. *Rogers, supra,* alluding to the principal issue in Alien Property cases, i.e., beneficial title, said (pp. 212-213):

> "* * * It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case * * *. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits. On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective."

In the *Societe* case, a non-resident foreign claimant stood accused of acting for German interests—but this Court ordered that he be heard on the merits. In the present case a resident-citizen claimant is denied this privilege. This, in spite of the fact that precedent—and every decided case in the law library—accords this privilege where a resident-citizen claimant is concerned (see Point VIII, *supra*).

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue.

Respectfully submitted,

WERNER C. VON CLEMM
Werner C. Von Clemm, *pro se.*

New York, N. Y.
December 27, 1966.